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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Tony Ray Almendarez,
10 Plaintiff,

No. CV 13-1995-PHX-RCB (SPL)

11 vs.

ORDER

12 John Imdorf, et al.,
13
14 Defendants.
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16 On August 5, 2013, Plaintiff Tony Ray Almendarez, who is confined in the
17 Maricopa County Fourth Avenue Jail, filed a Complaint in Maricopa County Superior
18 Court, Matter No. CV 2013-010195. In his Complaint, Plaintiff asserted claims of
19 unlawful arrest, malicious prosecution, defamation, illegal search and seizure and due
20 process violations. Plaintiff named two individuals in his Complaint: Phoenix Police
21 Officer John Imdorf and Phoenix Police Detective James Ferree. On October 2, 2013,
22 Defendants Imdorf and Ferree removed the case to federal court based on federal
23 question subject matter jurisdiction. On October 28, 2013, Plaintiff filed a Motion for
24 Leave to File an Amended Complaint along with a lodged proposed Amended
25 Complaint. In an Order dated December 4, 2013, the Court found that removal was
26 proper, ordered that Plaintiff's lodged Amended Complaint be filed as Plaintiff's First
27 Amended Complaint, and dismissed the First Amended Complaint with leave to amend
28 for failure to comply with Rule 8 of the Federal Rules of Civil Procedure.

On December 9, 2013, Plaintiff filed an Amended Complaint (Doc. 8) but did not use the court-approved form. On December 31, 2013, Plaintiff filed a Second Amended Complaint (Doc. 9) using the court-approved form. The Second Amended Complaint supersedes the Amended Complaint. On January 17, 2014, Defendants filed a Motion to Stay/Motion to Dismiss (Doc. 10). The Court will dismiss Defendant Ferree and Counts I and II of the Second Amended Complaint. The Court will not dismiss Count Three and Defendant Imdorf, but will not require Defendant Imdorf to answer Count III at this time. The Court will stay this case and will require Defendant Imdorf to file a notice every 90 days regarding the status of Plaintiff's pending state criminal case. The Court will deny the Motion to Stay/Motion to Dismiss.¹

I. Statutory Screening of Prisoner Complaints

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised claims that are legally frivolous or malicious, that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

A pleading must contain a "short and plain statement of the claim *showing* that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does not demand detailed factual allegations, "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

"[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads factual

¹ Defendants filed their Motion to Stay/Motion to Dismiss prior to screening by the Court of the Second Amended Complaint. As such, their motion was premature and, as to Counts I and II and Defendant Ferree, moot.

1 content that allows the court to draw the reasonable inference that the defendant is liable
2 for the misconduct alleged.” *Id.* “Determining whether a complaint states a plausible
3 claim for relief [is] . . . a context-specific task that requires the reviewing court to draw
4 on its judicial experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s
5 specific factual allegations may be consistent with a constitutional claim, a court must
6 assess whether there are other “more likely explanations” for a defendant’s conduct. *Id.*
7 at 681.

8 But as the United States Court of Appeals for the Ninth Circuit has instructed,
9 courts must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338,
10 342 (9th Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less
11 stringent standards than formal pleadings drafted by lawyers.’” *Id.* (quoting *Erickson v.*
12 *Pardus*, 551 U.S. 89, 94 (2007) (*per curiam*)).

13 **II. Second Amended Complaint**

14 In his Second Amended Complaint, Plaintiff alleges three counts of malicious
15 prosecution, arrest without probable cause, and an unfairly suggestive witness
16 identification procedure. Plaintiff sues Officer John Imdorf and Detective James Ferree
17 of the Phoenix Police Department. Plaintiff seeks compensatory and punitive damages
18 and court fees.

19 Plaintiff asserts a claim of malicious prosecution in Count I. Plaintiff alleges that
20 on August 23, 2012, Defendant Ferree was a witness during grand jury proceedings and
21 “fabricated and misrepresented facts in the reports” that led to Plaintiff’s indictment by
22 the grand jury for first-degree burglary and armed robbery. According to Plaintiff,
23 Ferree’s presentation to the grand jury “inculcate[d]” Plaintiff as an accomplice to a
24 crime when the correct facts would merely show Plaintiff “as being present when a crime
25 has been committed[.]” Plaintiff appears to allege that Ferree represented to the grand
26 jury that Plaintiff was the driver of a getaway vehicle when “the reports state the plaintiff
27 was the passenger.” Plaintiff also alleges that Ferree “confused material issues when he
28 misrepresented the passenger (which the reports state is the plaintiff) led the police on a

1 foot pursuit, when the reports state the passenger was apprehended without police
2 chasing him on foot.” Plaintiff makes further allegations about Ferree presenting
3 evidence that is apparently different from information in reports.

4 In Count II, Plaintiff alleges that on August 15, 2012, Defendant Imdorf arrested
5 Plaintiff without probable cause. Plaintiff alleges that Imdorf responded to a radio
6 broadcast of two men breaking things inside a house and that the men drove off from the
7 house in a blue car. Imdorf then saw a passenger leave a vehicle “without being
8 provoked by officers” and run off and hop over a brick wall. Imdorf “came into contact
9 with the plaintiff who fit the description in a front yard of a residence and without the
10 plaintiff resisting in any way he failed to read the plaintiff his Miranda rights or
11 investigate him in any way or advise him of the reasons he’s being arrested.” Imdorf
12 drew his weapon on Plaintiff, ordered him to the ground, and “violently placed him in
13 handcuffs.” Plaintiff alleges that Imdorf took him to a crime scene “he wasn’t suspected
14 of committing without trying to first gain the plaintiff’s permission or ex[.]igent
15 circumstances requiring it, which unduly infringed upon the plaintiff’s liberty and
16 constitutes an arrest without probable cause because the information in the officer’s
17 possession at the time of arrest only barely warranted the officer to conduct an
18 investigatory stop.”

19 In Count III, Plaintiff alleges that on August 15, 2012, Defendant Imdorf subjected
20 Plaintiff “to an unnecessarily and unduly [sic] identification procedure by transferring
21 [Plaintiff] from his place of detention without first attempting to gain his permission or
22 ex[.]igent circumstances requiring it to a crime scene that of which he wasn’t suspected of
23 committing to be identified by a fearful crying witness under poor visual conditions
24 because the witness wears prescription glasses and was in the back seat of a police cruiser
25 with a security mesh covered window blocking her view from (50) plus feet away[.]”
26 Plaintiff alleges that he was the only suspect in handcuffs and was surrounded by officers
27 who placed Plaintiff behind the vehicle that the witness had just identified as belonging to
28 the suspect she had witnessed in her home. Plaintiff asserts that the witness “was never

1 read any kind of identification card but was told that the police have the person in
 2 custody she described.” Plaintiff argues that “showing a suspect singly is widely
 3 condemned and with all the other suggestive circumstances involved this identification
 4 procedure is not only unnecessarily suggestive because officers had ample opportunity to
 5 conduct a more reliable less suggestive identification[.]”

6 **Additional Background**

7 According to records available online, Plaintiff is currently awaiting trial on a
 8 first-degree burglary charge in Maricopa County Superior Court Case #CR2012-007199-
 9 001 with an offense date of August 15, 2012.² A charge of armed robbery was dismissed
 10 by motion of the prosecution on May 31, 2013.³ Trial is currently scheduled for April 8,
 11 2014.⁴

12 **III. Failure to State a Claim**

13 To state a claim under § 1983, a plaintiff must allege facts supporting that (1) the
 14 conduct about which he complains was committed by a person acting under the color of
 15 state law and (2) the conduct deprived him of a federal constitutional or statutory right.
 16 *Wood v. Ostrander*, 879 F.2d 583, 587 (9th Cir. 1989). A plaintiff must also allege that
 17 he suffered a specific injury as a result of the conduct of a particular defendant and he
 18 must allege an affirmative link between the injury and the conduct of that defendant.
 19 *Rizzo v. Goode*, 423 U.S. 362, 371-72, 377 (1976).

20 **A. Malicious Prosecution (Count I)**

21 Plaintiff designates Count I as a claim for malicious prosecution regarding
 22 Defendant Ferree’s testimony during grand jury proceedings, which led to Plaintiff’s
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24 ²See [http://www.superiorcourt.maricopa.gov/docket/CriminalCourtCases/caseInfo](http://www.superiorcourt.maricopa.gov/docket/CriminalCourtCases/caseInfo.asp)
 25 .asp (last visited February 27, 2014).

26 ³ See Minute Entry dated May 31, 2013 at
 27 <http://www.courtminutes.maricopa.gov/docs/Criminal/062013/m5813238.pdf> (last visited
 February 27, 2014).

28 ⁴See Minute Entry dated February 2, 2014 at
<http://www.courtminutes.maricopa.gov/docs/Criminal/022014/m6179980.pdf> (last visited
 February 27, 2014).

1 indictment. To state a claim for malicious prosecution, a plaintiff must allege facts to
 2 support that a defendant prosecuted him with malice and without probable cause for the
 3 purpose of denying equal protection or another specific constitutional right. *Awabdy v.*
 4 *City of Adelanto*, 368 F.3d 1062, 1068 (9th Cir. 2004) (citing *Freeman v. City of Santa*
 5 *Ana*, 68 F.3d 1180, 1189 (9th Cir. 1995)).

6 Plaintiff alleges, and records available online confirm, that Plaintiff was indicted
 7 by the grand jury; that is sufficient to establish probable cause for Plaintiff's prosecution.
 8 *See Segura v. Cunanan*, 219 P.3d 228, 234 (Ariz. App. 2008) (probable cause for a
 9 prosecution may be established by obtaining a grand jury indictment). *Id.* Moreover, the
 10 Supreme Court has held that "a grand jury witness has absolute immunity from any
 11 § 1983 claim based on the witness' testimony." *Rehberg v. Paulk*, 132 S. Ct. 1497, 1506
 12 (2012) (investigator in district attorney's office was entitled to absolute immunity;
 13 however, "law enforcement officials who falsify affidavits" or "fabricate evidence
 14 concerning an unsolved crime" are only entitled to qualified immunity). Finally, a cause
 15 of action for malicious prosecution does not accrue until a plaintiff has been acquitted.
 16 *See Cabrera v. City of Huntington Park*, 159 F.3d 374, 382 (9th Cir.1998) (plaintiff's
 17 "malicious prosecution claim did not accrue until his acquittal"); *RK Ventures, Inc. v.*
 18 *City of Seattle*, 307 F.3d 1045, 1060 n.11 (9th Cir.2002) ("a claim of malicious
 19 prosecution does not accrue until the plaintiff is acquitted, because acquittal is an element
 20 of the claim"). Plaintiff does not allege, and it does not appear, that Plaintiff has been
 21 acquitted of the underlying charges. Accordingly, Plaintiff fails to state a claim for
 22 malicious prosecution and Count I and Defendant Ferree will be dismissed.

23 **B. Arrest (Count II)**

24 Plaintiff alleges in Count II that he was arrested by Defendant Imdorf without
 25 probable cause, in violation of the Fourth Amendment. Although unclear, Plaintiff
 26 appears to be attempting to allege a claim for false arrest. To state a § 1983 claim for
 27 false arrest, a plaintiff must allege that there was no probable cause for his arrest. *See*
 28 *Cabrera*, 159 F.3d at 380 (citing *George v. City of Long Beach*, 973 F.2d 706, 710 (9th

1 Cir.1992)). Probable cause “exists when under the totality of the circumstances known to
2 the arresting officers, a prudent person would have concluded that there was a fair
3 probability that [the person arrested] had committed a crime.” *Barlow v. Ground*, 943
4 F.2d 1132, 1135 (9th Cir. 1991). The Fourth Amendment requirement that arrest
5 warrants be based upon probable cause may be satisfied by an indictment returned by a
6 grand jury. *See Kalina v. Fletcher*, 522 U.S. 118, 129 (1997).

7 Here, Plaintiff alleges, and the state court docket confirms, that Plaintiff was
8 indicted by a grand jury, which establishes the existence of probable cause for Plaintiff’s
9 arrest. Accordingly, Plaintiff fails to state a claim for false arrest and Count II will be
10 dismissed.

11 **IV. Stay of Count III**

12 The abstention doctrine set forth in *Younger v. Harris*, 401 U.S. 37 (1971),
13 prevents a federal court in most circumstances from directly interfering with ongoing
14 criminal proceedings in state court. *Younger* principles also apply to a plaintiff’s request
15 for damages, but in that situation, a temporary stay, rather than dismissal, is appropriate.
16 *Gilbertson v. Albright*, 381 F.3d 965, 981 (9th Cir. 2004). Staying the federal case until
17 the state court criminal case is no longer pending

18 allows the federal plaintiff an opportunity to pursue constitutional
19 challenges in the state proceeding (assuming, of course, that such an
20 opportunity is available under state law), and the state an opportunity to
21 pass on those constitutional issues in the context of its own procedures,
22 while still preserving the federal plaintiff’s opportunity to pursue
23 compensation in the forum of his choice. In this way, neither the federal
24 plaintiff’s right to seek damages for constitutional violations nor the state’s
25 interest in its own system is frustrated.

26 *Id.*

27 In this case, Plaintiff alleges in Count III that Defendant Imdorf violated his
28 Fourteenth Amendment rights by subjecting him to an unduly suggestive witness
identification procedure. Charges incident to that procedure are currently pending against
Plaintiff in state court. If Plaintiff is convicted, it appears that success on his Fourteenth

1 Amendment claim in this case would necessarily imply the invalidity of such conviction.
 2 It appears, therefore, that a stay of this case is appropriate under *Younger* and *Gilbertson*.

3 It also appears that a stay is appropriate under *Wallace v. Kato*, 549 U.S. 384, 393-
 4 94 (2007). In that case, the Supreme Court stated:

5 [I]f a plaintiff files a false arrest claim before he has been convicted (or
 6 files any other claim related to rulings that will likely be made in a pending
 7 or anticipated criminal trial), it is within the power of the district court, and
 8 in accord with common practice, to stay the civil action until the criminal
 9 case or the likelihood of a criminal case is ended. If the plaintiff is
 10 ultimately convicted, and if the stayed civil suit would impugn that
 conviction, *Heck* [*v. Humphrey*, 512 U.S. 477 (1994)], will require
 dismissal; otherwise, the civil action will proceed, absent some other bar to
 suit.

11 *Id.* at 393-94 (citations omitted).⁵

12 Liberally construed, Plaintiff states a claim against Defendant Imdorf in Count III
 13 for violation of his Fourteenth Amendment rights. As discussed herein, a criminal case
 14 related to Plaintiff's remaining civil claim in this case is currently pending. The Court
 15 therefore finds that a stay of that claim appears to be appropriate in this civil case. If
 16 Plaintiff is ultimately convicted in his criminal case and his conviction is not reversed,
 17 expunged, or otherwise invalidated, the remaining claim in his Second Amended
 18 Complaint will be barred by *Heck*, because success on the claim would necessarily imply
 19 the invalidity of his conviction. *See Wallace*, 549 U.S. at 393; *Heck*, 512 U.S. at 486-87.
 20 However, if Plaintiff is not convicted, an answer to this claim will be appropriate.

21
 22 ⁵ In *Heck v. Humphrey*, the Supreme Court held:

23 [I]n order to recover damages for allegedly unconstitutional
 24 conviction or imprisonment, or for other harm caused by actions
 25 whose unlawfulness would render a conviction or sentence invalid, a
 26 § 1983 plaintiff must prove that the conviction or sentence has been
 27 reversed on direct appeal, expunged by executive order, declared
 28 invalid by a state tribunal authorized to make such determination, or
 called into question by a federal court's issuance of a writ of habeas
 corpus, 28 U.S.C. § 2254. A claim for damages bearing that
 relationship to a conviction or sentence that has *not* been so
 invalidated is not cognizable under § 1983.

512 U.S. 477, 486-87 (1994) (emphasis in original) (footnote omitted).

1 The Court will stay this case and will not require Defendant Imdorf to file an
 2 answer to Count III at this time. However, Defendant Imdorf will be required to file a
 3 notice every 90 days regarding the status of Plaintiff's pending criminal case.

4 **V. Warnings**

5 **A. Address Changes**

6 Plaintiff must file and serve a notice of a change of address in accordance with
 7 Rule 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion
 8 for other relief with a notice of change of address. Failure to comply may result in
 9 dismissal of this action.

10 **B. Copies**

11 Plaintiff must serve Defendant, or counsel if an appearance has been entered, a
 12 copy of every document that he files. Fed. R. Civ. P. 5(a). Each filing must include a
 13 certificate stating that a copy of the filing was served. Fed. R. Civ. P. 5(d). Also,
 14 Plaintiff must submit an additional copy of every filing for use by the Court. *See* LRCiv
 15 5.4. Failure to comply may result in the filing being stricken without further notice to
 16 Plaintiff.

17 **C. Possible Dismissal**

18 If Plaintiff fails to timely comply with every provision of this Order, including
 19 these warnings, the Court may dismiss this action without further notice. *See Ferdik v.*
 20 *Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action
 21 for failure to comply with any order of the Court).

22 **IT IS ORDERED:**

23 (1) Counts I and II are **dismissed** without prejudice.

24 (2) Defendant Ferree is **dismissed** without prejudice.

25 (3) Defendants' Motion to Stay/Motion to Dismiss (Doc. 10) is **denied** as
 26 premature.

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28 ...


1 (4) This case is **stayed** pending the resolution of Plaintiff's criminal case
2 currently pending in the Maricopa County Superior Court, case #CR2012-007199-001.
3 The Clerk of Court must indicate on the docket that this case is **stayed**.

4 (5) Within **90 days**, Defendant Imdorf **must file** with the Court a "Notice of
5 Status" that informs the Court of the status of Plaintiff's criminal case currently pending
6 in the Maricopa County Superior Court, case #CR2012-007199-001.

7 (6) Defendant Imdorf **must file** a "Notice of Status" within 15 days after entry
8 of judgment in Maricopa County Superior Court case #CR2012-007199-001.

9 (7) Defendant Imdorf **must not** answer or otherwise respond to Count III in the
10 Second Amended Complaint **until further order of the Court**.

11 DATED this 5th day of March, 2014.

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14 Robert C. Broomfield
15 Senior United States District Judge
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